Supreme Court, U.S.
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No. 94-684

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

AIRBUS INDUSTRIE, ET AL.,

Petitioners,

V.

LAURA HOWELL LINTON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. § 1447(d) bars appellate review of an order of remand based on lack of jurisdiction where the removing party failed to prove its right to remove under the Foreign Sovereign Immunities Act.

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BRIEF IN OPPOSITION

Respondents, Laura Howell Linton, *et al.*[1], respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Fifth Circuit's opinion below. That opinion is reported at 30 F.3d 592 (5th Cir. 1994) and is reprinted in the petition for certiorari at Appendix A.

[1]The full list of respondents is included in the "Parties" section of the petition for certiorari.

STATUTES INVOLVED

28 U.S.C. § 1447(d) provides:

> An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1443 of this title [civil rights cases] shall be reviewable by appeal or otherwise. (brackets supplied)

STATEMENT OF THE CASE

In March, 1992, Airbus Industrie and Aeroformation (the "Airbus Defendants") removed separate wrongful death actions filed in Texas state court to federal court based upon the allegation of federal question jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 ("FSIA") and diversity jurisdiction.

The Airbus Defendants based their right to FSIA removal solely upon a contention that they were a "foreign state" -- despite the undisputed fact that no foreign state owned a majority interest in those entities. *See* 28 U.S.C. § 1602(b)(2). This "foreign state" contention depended upon a convoluted three-tiered formula in which the defendants asserted that, although they were owned by entities which were not themselves foreign states, those entities had minority interests by foreign states that, when pooled together, equaled a "foreign state" for the purposes of the FSIA. The district court found, even assuming for the sake of argument that the

defendants' calculations were correct[2], that the defendants had failed to prove that they were a "foreign state" for the purposes of the FSIA. *See* Petition, at E-7. Contrary to the petitioners' assertion, this order did not deny immunity under the FSIA nor did it address the petitioners' pending motions to dismiss. The order merely addressed the question of proper removal jurisdiction.

The Airbus Defendants attempted an interlocutory appeal of that order, but the Fifth Circuit dismissed that appeal and held that the FSIA order was not final nor appealable, that the defendants had not sought certification and that the collateral order doctrine[3] did not apply. *See* Petition, at I-1,2. The Fifth Circuit specifically found that the order "*did not* dispose of plaintiffs' motion to remand nor Airbus Defendants' various motions to dismiss." *Id.* (emphasis added).

After that appeal, the district court first denied remand based on diversity but later granted remand based upon a

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[2] The plaintiffs disputed the accuracy and admissibility of the defendants' calculations and presented other evidence which proved that even under defendants' convoluted formula, there was no majority interest. The district court accepted the defendants' calculations only for the purposes of the order and made no final resolution of the matter. *See Linton v. Airbus Industrie*, 794 F.Supp. 650, 652 n.3 (S.D. Tex. 1992), *appeal dism'd*, 30 F.3d 592 (5th Cir. 1994).

[3] The collateral order doctrine permits interlocutory appeals if an order "conclusively" determines the disputed question, resolves an important issue "separate from the merits of the action," and is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

stipulation of citizenship filed by the defendants. *See* Petition, at B-9. Based upon that admission, the district court concluded "that it lacks subject matter jurisdiction." *Id.* at B-10[4].

The district court expressly ordered that plaintiffs' motion to remand is "GRANTED FOR LACK OF SUBJECT MATTER JURISDICTION" *Id.* (capitals in original)

Notwithstanding the acknowledged bar to appellate review of orders of remand based on lack of jurisdiction contained in 28 U.S.C. § 1447(d), the Airbus Defendants attempted to invoke appellate jurisdiction under direct appeal, the separable order doctrine, a recall of the prior mandate, the collateral order doctrine, and mandamus. The Fifth Circuit found that the district court's FSIA order was a "jurisdictional finding under the facts of this case and, as such, can be reviewed by the state court upon remand." *See* Petition, at A-11. Since neither the separable order doctrine nor any other theory applied to avoid the section 1447(d) bar to review, the Fifth Circuit dismissed the appeal.

In this petition, the Airbus Defendants argue only that the separable order doctrine applies to circumvent section 1447(d)'s well-established bar to appellate review. A review of the facts of this case and relevant authorities reveals that the doctrine does not apply and that certiorari should be denied.

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[4] The petitioners do not contend in their petition that the district court's finding that there was no diversity jurisdiction was erroneous.

REASONS TO DENY THE WRIT

I. The Fifth Circuit Correctly Held That The District Court's Remand Order Was Unreviewable On Appeal.

In an effort to obtain review here, the petitioners have mischaracterized the nature of the question presented. The petitioners' question presented suggests that the district court below issued a separable order "denying a party's claim of immunity from suit under the Foreign Sovereign Immunities Act." *See* Petition, "Question Presented For Review," at i. This suggestion is incorrect.

The district court never ruled on the Airbus Defendants' motions to dismiss for immunity because the court found that it lacked subject matter jurisdiction to do so and remanded the case. The Airbus Defendants can point to no order in this record in which the district court denied their claim of FSIA immunity. As the Fifth Circuit found, the district court's FSIA order was a non-final, non-preclusive jurisdictional finding, which decided only that the defendants had failed to meet their burden to prove their claims of removal jurisdiction.

Of course, if the district court *had* issued a final order which denied the Airbus Defendants' claim of FSIA immunity, then such an order would be appealable under the "collateral order" doctrine. *See e.g. Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 385 (5th Cir. 1991); *Rush Presbyterian-St. Lukes Medical Center v. The Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 333 (1990); *Compania Mexicana de Aviacion v.*

United States District Court, 859 F.2d 1354, 1358 (9th Cir. 1988); *Gould, Inc. v. Pechiney Ugine Kuhlman & Trefimetaux*, 853 F.2d 445, 450 (6th Cir. 1988).

But because there was no final, conclusive denial of FSIA immunity in this case, the defendants cannot take solace in the "collateral order" doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Thus, they attempt to manufacture a "separable order" premise to invoke appellate review. As the Fifth Circuit found, this premise does not "hang together." *See* Petition, at A-8.

Review is precluded here because the district court's jurisdictional findings in conjunction with an order of remand are immunized from appellate review by 28 U.S.C. § 1447(d), even if those findings are clearly erroneous. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 723-24 (1977) (per curiam) (review precluded even if the district court "employed erroneous principles in concluding that it was without jurisdiction"). This has been the rule since 1887. *Thermtron Products, Inc.*, 423 U.S. at 343.

The rationale behind this long established rule was succinctly stated by Chief Justice (then Justice) Rehnquist in 1976:

> If anything is clear from the history of the prohibition against review, it is that Congress decided that potential errors in individual cases did not justify permitting litigants to challenge remand orders. To carry out its policy of avoiding further interruption of the litigation of removed causes, properly begun in state courts...Congress decided to place final responsibility for implementation of its removal scheme with the district courts.

Id. at 360-61 (Rehnquist, J., dissenting). The Fifth Circuit recognized and reaffirmed this rule in its opinion below.

The Airbus Defendants also suggest that this case should somehow be different because removal was predicated on the FSIA. This suggestion that the rule should apply differently for different categories of cases was rejected by this Court in 1946. *See United States v. Rice*, 327 U.S. 742 (1946). There, removal was predicated not on the general removal statutes then in effect, but on a special removal statute which involved federally restricted land interests of an Indian. In response to an argument that the forerunner of section 1447(d) did not apply to this special statute, the Court held that the bar to appellate review was "intended to be applicable not only to remand orders made in suits removed under [the general removal statutes], but to cases removed under any other statutes, as well." *Id.* at 752; *see also Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993) ("Section 1447(d) predated FSIA and its removal provision, but Congress

made no exception for appellate review of a remanded FSIA case, as it has done for civil rights and FDIC cases.")

The district court below found that the defendants had failed to prove their right to FSIA removal and the court remanded the case. Under section 1447(d), the district court's findings, even if erroneous, are not reviewable on appeal. For this reason, the Fifth Circuit was correct and the petition for certiorari should be denied.

II. The Fifth Circuit's Opinion Is In Harmony With Other Circuits Since The FSIA Finding Was Jurisdictional And Not Preclusive.

In an effort to invoke this Court's jurisdiction, the petitioners attempt to create a conflict where there is none. Not a single one of the cases which the petitioners cite as being in conflict with the decision below involved FSIA removal or even similar facts. All involve carefully delineated and narrow exceptions that do not apply to the facts of this case. The petitioners have attempted to merge these narrow exceptions together into a single expansive doctrine which they call the "separable order" doctrine.

As an analysis of those cases reveals, the petitioners' "separable order" doctrine is in reality a number of doctrines, each of which apply to a unique and narrow set of facts -- facts which are not presented here.

Since there is no direct, real or intolerable conflict among Circuits on the issues presented, there is no foundation for review.

A. This Case Does Not Fit Within The *Waco* Exception Since There Was No Preclusive Denial Of Immunity.

The Airbus Defendants base their "separable order" premise on this Court's opinion in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In *Waco*, this Court permitted review of an order of dismissal of a cross-claim since that order "in logic and in fact" preceded the remand order and was "conclusive" on the substantive rights of the petitioner to reassert the cross-claim. *Id.* at 143.

In the present case, there was no dismissed claim nor any order which "in logic and in fact" was "separable" from the district court's jurisdictional determinations regarding remand. *See Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) (good discussion of the applicability of the *Waco* doctrine). And, as the Fifth Circuit stated, the FSIA conclusions about which the petitioners complain "were jurisdictional under the facts of this case; they thereby have no preclusive effect on the state courts." *See* Petition, at A-13.

In contrast to the petitioners' representations, the district court did *not* deny their claim of FSIA immunity. The district court never ruled on their motions to dismiss because the court found that the petitioners, in the first instance, had not met their burden to prove their right to removal. Since the district court found that it had no subject matter jurisdiction, the district court had no authority to rule on the petitioners' substantive defenses. *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 483 F.2d 1341, 1346 (6th Cir. 1993); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989).

The Fifth Circuit's holding that jurisdictional findings issued incident to a remand order have no preclusive effect on a party's substantive rights is the rule followed by almost all of the Circuits that have considered the issue. *See Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993) (collecting cases). Since federal law determines the preclusive effect of federal orders -- regardless of whether the court applying the judgment is state or federal -- the Fifth Circuit's holding that the district court's FSIA order is jurisdictional and non-preclusive will permit the petitioners to raise FSIA immunity again in state court. *See id.* at 321-22.

Since the FSIA order did not deny immunity and is not "conclusive" of that issue, the *Waco* doctrine does not apply[5].

B. This Case Does Not Fit Within The *TMI* Exception Since There Was No Finding Of Unconstitutionality.

Another case relied upon by the petitioners for conflict is *In re TMI Litigation Cases*, 940 F.2d 832 (3d Cir. 1991), *cert. denied* 112 S.Ct. 1262 (1992). In that case, the Third Circuit held that, although normal remand orders are unreviewable under section 1447(d), an appellate court can review a remand order in which the district court finds the

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[5] In *Waco*, the court recognized that the dismissal order could be reviewed but not the remand order, which was unreviewable by statute. 293 U.S. at 143. The Third Circuit, in a case also relied upon by the petitioners for conflict, extended *Waco* to a review of the remand order as well. *See Carr v. American Red Cross*, 17 F.3d 671, 679 (3d Cir. 1994). However, even under *Carr*, the order to be reviewed must be "final" and "conclusive" and must satisfy the finality requirements of the collateral order doctrine. *Id.* at 675. Under *Carr*, an order is not "final" if, as here, it can be reviewed by the state court. *Id.* at 677.

removal statute unconstitutional. *Id.* at 845. The Third Circuit recognized that the question presented there was "unique" and the court emphasized that its conclusion "is a narrow one and should in no way frustrate the policy underlying section 1447(d)." *Id.* at 847. Other Circuits have held that this exception to unreviewability does not apply unless the district court makes constitutional rulings. *See e.g. Nutter,* 4 F.3d at 323.

In the present case, the district court made no rulings on the constitutionality of the removal statute, so the *TMI* exception is not in conflict and does not apply.

C. This Case Does Not Fit Within The *Pelleport/Clorox* Exception Since The Remand Order Was Based On Lack Of Jurisdiction.

Finally, the petitioners attempt to set up a conflict with the Ninth Circuit and the Sixth Circuit by reliance upon the so-called "*Pelleport/Clorox*" exception. *Pelleport* involved a remand based not on lack of jurisdiction but on the parties' prior agreement in a forum selection clause. *Pelleport Investors v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984). Similarly, *Clorox* involved a remand based not on lack of jurisdiction but on the contractual waiver not to remove found in an employee handbook. *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985). In both of these cases, the Ninth Circuit held that since the remand order was not based upon lack of jurisdiction but on a forum selection issue separate and apart from any jurisdictional decision, the remand orders could be reviewed. *Pelleport*, 741 F.2d at 277; *Clorox*, 779 F.2d at 520.

The Sixth Circuit case, which petitioners also allege is in conflict with this case, was also a forum selection clause case which expressly applied the *Pelleport/Clorox* exception. *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). In fact, this forum selection clause exception is uniformly followed by the majority of the Circuits -- *including* the Fifth Circuit. *See e.g. McDermott Int'l, Inc. v. Lloyds Underwriters,* 944 F.2d 1199, 1203 n. 5 (5th Cir. 1991); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir.), *cert. denied*, 112 S.Ct. 302 (1991); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988).

But, the present case has nothing to do with a forum selection clause. The remand here was expressly based on lack of subject matter jurisdiction. Since the remand here was based on lack of jurisdiction as stated in the remand order, section 1447(d) precludes appellate review. *Pelleport*, 741 F.2d at 276 ("a district court's decision that it lacks subject matter jurisdiction to hear a case is not reviewable"); *Clorox*, 779 F.2d at 520 (Section 1447(d) bars review of "those remand orders which are based on lack of jurisdiction"). Other Circuits have also held that the *Pelleport/Clorox* exception is a "narrow one" and "expressly does not permit review of a remand order based on lack of jurisdiction." *See e.g. Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1986); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993) (dismissing similar attempts to extend the exception as "too facile").

Since the *Pelleport/Clorox* exception also does not conflict with the decision below and also does not apply on these facts, the petition should be denied.

III. The Fifth Circuit Opinion Will Not Produce Anomalous Results Since It Was Based On Its Own Facts.

Even though the petitioners will still have an opportunity to raise their "foreign state" theory in the state court on remand, the petitioners claim that review is required to eliminate "bizarre" or "disastrous" results. The petitioners provide two examples.

In the first example, the petitioners contend that one Circuit held that ICI was a foreign state under the FSIA while another did not. *Compare In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1238 n. 8 (3rd Cir.), *cert. denied*, 63 U.S.L.W. 3009 (U.S. Oct. 3, 1994), *with Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993). The petitioners fail to point out that in the first case, ICI had been taken over by the Irish government while in the latter case, ICI's acts occurred while it was still a private entity. *See PCB Litigation*, 15 F.3d at 1245; *Mobil Corp.*, 984 F.2d at 665.

In the second example, the petitioners cite a district court case which is now under appeal. *Kern v. Jeppesen Sanderson, Inc.*, No. 14-93-3065 (S.D. Tex., June 13, 1994, *appeal pending*). The petitioners contend that the *Kern* case conflicts with the present case since in *Kern*, the district judge found that Airbus *was* a foreign state. What the petitioners fail to point out is that, after they lost that issue in this case and in an effort to distinguish this decision, the petitioners presented the second federal judge with a different time frame and a different calculation of ownership interests. *See* "Airbus Defendants' Consolidated Memorandum In Support of Consolidated Motion to Dismiss" at 11-12 and 13 n.11 (arguing

that the "operative date" for foreign state status in *Kern* was 1977, instead of 1989, and that "[t]his Court is not presented here with the ownership problem that troubled the court in [*Linton*]"), filed November 30, 1993 in *Kern v. Jeppesen Sanderson, Inc.*, H-93-3065 (S.D. Tex). Each case was based upon its own facts.

Further, the petitioners have failed to point out that the FSIA Order, which they so loudly decry, never made a final factual resolution of the asserted ownership interests. *See Linton*, 794 F.Supp. at 652 n.3. The court used the defendants' disputed calculations for the purposes of its order but held that the court's use of those calculations "does not imply final acceptance." *Id.*

Thus, what petitioners ask this Court to review is a non-final, non-preclusive jurisdictional finding incident to an order of remand for lack of subject matter jurisdiction which is unreviewable on appeal pursuant to 28 U.S.C. § 1447(d). Since the district court did not resolve the factual dispute concerning ownership interests nor make any factual findings, this Court could not review the matter even if an exception to section 1447(d) applied. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687 (1993) (appellate review is precluded of determinations which are "tentative, informal or incomplete").

The petitioners have not shown any real or intolerable conflict between the decision below and any opinion of other Circuits or this Court. The petitioners have not shown any important reason to do away with over 100 years of jurisprudence and carve out a broad exception to the well-established rule of unreviewability of remand orders in section 1447(d).

To permit appellate review here would all but eviscerate the rule, since under the petitioners' logic, all non-final, non-preclusive jurisdictional findings incident to remand orders would be subject to appellate review. Such review would surely increase the delays and protract the litigation over jurisdictional issues which it was the avowed purpose of section 1447(d) to resolve. *See Thermtron Products, Inc.*, 423 U.S. at 351.

The petitioners contend that Congress mandated a federal forum for suits against them. This contention is incorrect. The FSIA "clearly contemplates that such suits may be brought in either federal or state courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S 480, 489 (1983). As the Fifth Circuit held, the petitioners are free to raise the undetermined issue of FSIA immunity in state court on remand. The petitioners should do so, rather than attempt further resolution of the facts and legal issues before this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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